Study H-855 June 5, 2008

First Supplement to Memorandum 2008-28

Common Interest Development Law: Priorities (Public Comment)

The Commission has received a number of letters on the matters discussed in Memorandum 2008-28. Those letters are reproduced in the Exhibit as follows:

Respectfully submitted,

Brian Hebert
Executive Secretary

Kazuko K. Artus, Ph.D., J.D.
Email: Kazukokartus@aol.com
Gramercy Towers 1523
1177 California Street, San Francisco, CA 94108

2 June 2008

CID Law Reform

Thank you for your updates. I am happy to see that Assembly Bill 1921 has received an overwhelming support in the Assembly, even though that does not prevent me from complaining about a recent amendment in my capacity as a prospective user of the forthcoming (I hope) legislation. Noted below are my reactions to some of the statements in Memorandum 2008-28 and First Supplement to Memorandum 2008-12.

Assembly Bill 1921
Member Bill of Rights
I would like to see the Member Bill of Rights spelled out at some stage. However, that will have to come after extensive discussions of what characteristics CID associations should have (to what extent governmental and to what extent private?), which must take into account of the views of governance experts outside the CID field, such as political scientists and community organizers. The Commission has properly decided not to take up this subject in its project devoted to the statutory clarification and simplification of CID law. That said, I hope that the Commission will take some preliminary steps before long under its authority to study revision of CID statutory law and will proceed at a measured pace—before a major disaster compels the legislature to deal with the subject.

Proposed Civ. Code § 4540 (c) as Amended on 22 May 2008
The amendment made to proposed § 4540 (c) on 22 May 2008 is an unjustified step backward. In general, law should encourage the boards of CID associations to conduct their businesses in open meetings to the maximum extent possible, for the sake of accountability, fairness and transparency. A member who is involved in an assessment dispute or is potentially subject to a disciplinary action should be able to dictate whether the board will consider the matter in executive session or in an open meeting. The board should be allowed to consider such matters in a closed session only where the member concerned wishes it.

By my recollection, this provision has gone through at least two amendments since the Tentative Recommendation of June 2007, in which the Commission invited comments on whether existing law, which allows a board to conduct certain proceedings in closed session regardless of the preference of the member who is the subject. Tentative Recommendation p. 52. A few of us commented that boards should not be allowed to force a closed session on members who were the subject of the proceedings, but, since the comments were not unanimous, the Commission staff decided to recommend the preservation of existing law. First Supplement [to] Memorandum 2007-47 pp. 35-36.

The Commission amended the provision at its December 2007 meeting to give the subject member a choice between a closed session and an open session. Minutes of Meeting held on 13-14 December 2007 p. 8. Assembly Bill 1921 introduced in February 2008 incorporated the text that the Commission adopted at its December meeting. It appears that the 22 May amendment was attributable to the objection of the Community Association Institute to the pre-existing (8 February 2008) text, but the ground for the CAI objection reported on p. 6 of First Supplement to Memorandum 2008-12 is not persuasive. I would much appreciate it if the Commission would persuade the Senate to reverse the 22 May amendment.

Continued Study

Davis-Stirling Light (Memorandum 2008-28 p. 3)

It would be a good idea to pay a special attention to small associations in the near future. In doing so, however, the Commission should keep in mind that members of many small CID associations need the protection of the governance procedures of the Davis-Stirling Act as much as members of large associations; it should not presume that associations with 25 units (or whatever the threshold) or less can generally be exempted from certain governance procedures without putting members at a serious disadvantage.

I suggest a voluntary approach, under which association members would vote periodically to decide whether to exempt their association from certain statutory mandates for a specified period of time, e.g., two years, ten years. In small associations that are operating well, that is, those that are likely to function properly without externally imposed procedures, it would not be difficult (and hence not be expensive) for the board to secure members' permission to deviate from such requirements as a four-day notice of each board meeting that includes the agenda of the meeting (imposed by Civ. Code § 1363.05 (f)).

Developments Without Common Area (Memorandum 2008-28 p. 3)

Why would the Commission have to devote its resources on this further? What types of development does proposed § 4100 fail to cover—despite the language of proposed § 4100 (b)? It seems to me that all you need is the deletion of proposed § 4015 (b), which would merely be a clarifying act and would be consistent with the purpose of the present project to clarify and simplify CID law.

The concept of a common area consisting of "mutual or reciprocal easement rights appurtenant to the separate interests" is not new; it has been established by present Civ. Code § 1351 (b). The problem is with present § 1374, which raises unnecessary questions on the meaning of the 3d sentence of present § 1351 (b). I count on the Commission to persuade the legislature to delete proposed § 4015 (b).

EMAIL FROM BOB SHEPPARD, WALNUT HOUSE COOPERATIVE (JUNE 2, 2008)

Brian and Commissioners:

We believe that the current laws to which housing cooperatives are subject confuse cooperatives with condominiums and include many inconsistent and inaccurate provisions that are unfair, undecipherable, inapplicable and irrelevant for many cooperatives. This situation may have begun on or before the passage of the Davis-Stirling Common Interest Development Act. Over the course of the past year, we have submitted many comments to the Commission on this subject. To minimize repetition, I have not included them here.

Therefore, we request that the Commission study housing cooperatives and produce draft legislation that properly treats such cooperatives. The study should also resolve conflicts between various statutes and with current legal and operational practices in the field.

Some of the issues that we believe the Commission should study include:

- The legal distinctions between housing cooperatives and other forms of common interest developments. We believe such distinctions are substantive and not generally understood outside of New York, Illinois, Florida and the community of cooperatives.

- Ways to allow simplified governance practices if members desire them (particularly relevant for small CIDs, LEHCs and cohousing communities).

- An understanding of the current practice and historical basis of the nature of the tenant-shareholder interests of members, rather than the equitable servitude genesis of condominiums. Condominium-style "declarations" should be optional for new stock cooperatives.

- The reigning in of legislative tendencies to overreach, when there is not an overriding policy need to do so. Co-ops have been operating for over eighty years using corporate, contract and landlord-tenant law.

- Protections for members in self-managed co-ops and cohousing communities where members are required to contribute labor.

- The study of the benefits of the diverse entities which can and have

been contructed primarily using the above laws. For example, housing co-ops include mobile home parks, permanently affordable housing, land co-ops, luxury housing, leaseing co-ops, and co-ops set up by land trusts.

There are approximately 30,000 stock cooperative units in California. It's long past the time that California law treats us with the same care as other forms of property ownership. Therefore, we urge that the Commission begin such a study immediately.

One option for structuring a solution might involve partially emulating the organization of the legal framework of a few other states. In such an approach (1) organizational corporate statutes would be preserved, permitting flexibility, (2) a common basis of laws would apply to the governance of all common interest developments, and (3) separate laws would apply to each types of CID (e.g. co-ops, condos, etc.) overriding corporate and governance laws, as applicable.

Bob Sheppard, Legislative Coordinator
Walnut House Cooperative

HR
Hollister Ranch

June 4, 2008

California Law Revision Commission
c/o Mr. Brian Hebert, Executive Secretary
3200 5th Street
Sacramento, CA 95817

Re: *Common Interest Development Law: Priorities*

Dear Members of the Commission:

Thank you for taking the lead to address matters of interest to common interest developments and their owners in California. The Hollister Ranch Owners' Association applauds your efforts, including all of the efforts that CLRC invested in the recodification of Davis-Stirling. We are supportive of AB 1921's passage, and believe the leadership you provided and the efforts you and your staff undertook will prove to be well worthwhile.

We recognize that there are many other matters also calling for your attention. However, we also believe that much of the inherent value in recodifying Davis-Stirling will be achieved only if the Commission and others work together to take the needed next steps to address the many challenges the CID industry, and the Californians who live in or own portions of CIDs, now face.

We have read staff's recommendations on your next steps, and would like to provide just a few of our reactions and suggestions here. These fall into two broad areas—governance and differentiation.

First, as to governance. We believe that current state law regarding the governance of CIDs is sorely in need of rethinking. Some provisions treat us as corporations, others as local governments, and still others as something entirely different. In reality, we are hybrids. Most of us are incorporated, and our governing documents often require us to take those actions that will protect and enhance our members' financial investments in their real property. We are also quasi-governmental agencies, providing many of the public safety and land use restrictions and services that local governments would otherwise provide. In addition, many of us are access-restricted communities, and provide amenities and other recreational opportunities for our members, including hiking trails, golf courses, swimming pools, and the like. Thus, to be effective, our governing structures and processes must provide for the seamless merging of each of these perspectives. That is certainly not possible with the current amalgam of inconsistent restrictions we face.

Good governance can be fragile. To address just one aspect of governance: other than New England towns and their annual town meetings, CIDs may be the last, best opportunity to provide local

1000 Hollister Ranch | Gaviota, California 93117-9757
P: 805.567.5020 | F: 805.567.1119 | HROA@silcom.com

governance that is founded on basic, sound democratic principles, achieving a unique balance of representative and direct governance. The 2006 changes to the regulation of our election processes in Civil Code §1363.03 took us several steps forward but also several steps back, in large part because there was not an adequate reflection of these basic principles.

Second, as to differentiation. Current state law makes virtually no distinctions among the various types and sizes of CIDs that exist throughout the state. Thus, for example, the election requirements are the same for a commercial CID with 5 owners as they are for the residential association with 28,000 owners. We believe that current law is too restrictive and complex for the small CIDs and, conversely, doesn't always set the bar high enough for large or sophisticated CIDs. Hollister Ranch and many other large CIDs would probably be supportive of more of the types of improvements that could and should be considered, even if they were perceived as raising the standards for us, as long as the standards made appropriate allowances for those less able.

The state has made ample use of some of the options that are available to address differentiation in other areas. For example, there are a variety of special districts (such as community services districts, resource conservation districts, and the like) in California, with restrictions and regulations tailored to each. Similarly, municipalities in California have more commonality with each other than CIDs do with each other, yet have more flexibility to structure themselves to meet individual needs. For example, cities have the option to be governed as general law cities or charter cities; CIDs have no such flexibility. Or again, just as zoning laws are tailored to the specific type of use, so too could state law governing CIDs. Davis-Stirling doesn't currently reflect any recognition by the state that one size doesn't fit all for CIDs.

We also believe that the CID industry should in fact be treated as an integrated industry able to establish and adhere to its own standards. Thus, we should be challenged and charged to resolve many of our own problems. The legislature does not need to micromanage the industry. Instead, the state should establish the broad framework and then ensure that we address the specifics. As one example, CACM has had a Code of Ethics for managers since 1992, and has consistently taken enforcement action against managers who violate the code.

The industry needs the opportunity to address itself those CIDs that don't reflect their members' wishes or that have boards making unethical decisions or otherwise violating accepted standards. The system should be created such that the large or capable CIDs, as well as the vendors who serve us, realize that it is in all of our interests to assist the small and unsophisticated. (Given that professional management companies provide management services and expertise for most of the smaller associations, this might be particularly achievable in our industry.)

And, given that many of us have chosen to wall ourselves off from the outside world, with all of the negative impacts that such an action can have on the larger community, there should be some restrictions and incentives for us to stay involved in the outside communities of which we are a part.

We would appreciate the chance to work with you if you find any of this input helpful. We have many

additional thoughts and ideas. Progress is needed, and we would like to work with you in a collaborative manner to achieve it.

Please contact Robyn Black in Sacramento, at (916) 448-3444, or me here in Gaviota, at (805) 456-7050, with any questions or comments.

Sincerely,

[signed]

Thomas Frutchey, General Manager
Hollister Ranch Owners' Association

cc: Robyn Black, c/o Aaron Read & Associates

5 High Bluff
Laguna Niguel, CA 92677
June 3, 2008

Via Email

Mr. Brian Hebert
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Brian:

Here are my comments for the recently distributed Memorandum 08-28 dated May 29, 2008:

Hiatus: As the commission points out, the biggest disadvantage is delay. However, it might be best to see how AB 1921 "plays out" before taking on more work. Often times the "law of unintended consequences" results in "clean up" legislation to correct an unforeseen problem.

Comprehensive Study of Broad Subject Area: A good way to avoid the "law of unintended consequences" mentioned in the previous paragraph. Studying broad areas, (accounting being an example) would give the commission the ability to avoid unintended consequences, reduce the resources that are expended and give the commission the opportunity to take an in-depth approach to how one particular subject interacts and affects other portions of CID law.

Special Treatment of Small Associations: Small associations are definitely at a disadvantage when it comes to Davis-Stirling. If, as reported, there are 41,000 CID's in California, then 20,500 have 25 "members" or less. I understand the concern by Ms. Lynch about having a neighbor (and fellow board member) over for coffee, however, the open meeting act (Civil Code 1363.05 (f) is clear: "As used in this section, 'meeting' includes any congregation of a majority of the members of the board at the same time and place to hear, discuss, or deliberate upon any item of business scheduled to be heard by the board [my emphasis], except those matters that may be discussed in executive session." As long as Ms. Lynch and her guest socialize and do not discuss HOA business, they have nothing to fear. It becomes problematic when boards decide to have "mini-meetings" to deal with situations that come up between meetings. A former board member (and president) told me that they had regular meetings to discuss such issues as landscaping, homeowner correspondence and budgeting. This was done without giving notice to the membership, without allowing members to speak and producing no minutes

of such meetings.

The idea of a "Davis-Stirling Lite" may be appropriate—stripping out some of the more "onerous" requirements—but which ones? As I understand it, Davis-Stirling was implemented for the very reason that associations were not complying with certain requirements and this gave them a "one-stop" source document. Certainly legislation that has been enacted (Civil Code 1363.03—Voting Rules) was done so to address some specific actions by boards that conducted elections reminiscent of third-rate dictatorships and totalitarian states rather than the democratic principles that most Americans hold dear—free and fair elections that are transparent. . If boards of these small organizations don't have the desire to read and follow the pertinent CID law and because there is no credible enforcement organization (without AB 567 there is not) then Davis-Stirling doesn't really make much difference to organizations, big or small, that remain either ignorant or contemptuous toward Davis-Stirling.

Reserve Funding: Reserve funding should be of great concern to all homeowners but I think that most don't understand the reserve studies that are sent out to them. Boards, for the most part, are loath to increase assessments and reserves are easy to "short change," as life spans for such items as pools, spas, roofs, parking lots et cetera are long enough away for most board members to "leave it to the next board" to worry about. My own association has only recently started reserve funding for v-ditches. A former property manager stated, "Your most recent reserve does not include any replacement for v-ditches as these common area elements are <u>assumed to exist through the lifetime of your community</u> [my emphasis]." Perhaps she believed that they should last 30+ years—but we recently spent around $26,000 removing and replacing v-ditches that were cracked and broken as a result of the expansive soil in our area. The association was formed in 1991.

Elections, Meeting Procedures, Record Inspection: These are areas that could definitely benefit from further study by the commission. My own association attempted to conduct a recall of four board members without sending out ballots! I was chastised after the board received a letter from the Public Inquiry Unit (PIU) of the Attorney General's office regarding the complaint that I filed with regard to this. The attorney who was handling the recall (not our regular association attorney who wrote the new voting rules and procedures for the association) said he was unfamiliar with the requirements of the emergency legislation that was passed in September 2006 with regard to recalls. Never mind that the requirement to send out ballots for an election (what is a recall if not an election?) never changed and this particular attorney was hired because of the "success" that he had at another association that had a recall. A successful recall, if you were the one being recalled, would be remaining in office at the end of the recall. The very people who were being recalled hired this particular attorney.

Meeting procedures continue to give my association problems—the attached "Notice of Meeting" and the accompanying agenda for the meeting clearly shows a property manager and board president who did not understand that discussing and voting on the next year's budget and special assessment can not be conducted in Executive Session.

As for records inspection, this portion of the law needs to be tightened. If an association does not have an office on the property, then the association shall make the records available for inspection and copying at a place that the two parties agree upon. If they can't agree on a location, the association may satisfy the requirement to make the association records available for inspection and copying by mailing copies of the specifically identified records to the requester. In other words, if management refuses to meet at an offsite location, management does not need to produce the records. I requested to receive a copy of a check in August of 2006 and on three other separate occasions. I still have not received a copy of the requested check.

No matter what tact the commission takes, further study of CID law is appropriate and needed. One of the biggest problems is the lack of enforcement of CID law by the state. Although AB 567, if passed and signed into law, will provide an enforcement provision, as it now stands individual members of associations (which number around four million according to statistics provided by Levy & Company and noted in the Tentative Recommendation {June 2007} of the Statutory Clarification and Simplification of CID Law produced by the Commission) are left with nothing short of hiring an attorney and going to Superior Court. This is analogous with having to hire a private security firm to enforce the criminal code.

Thanks for all of the commission's work on improving CID law in California.

Sincerely,

Pete Wilke
949 632-0928

Attachments

SAN MARIN ASSOCIATION

Board of Directors Meeting (Special Session)
Friday, November 26, 2007
*** AGENDA ***

I. CALL TO ORDER SPECIAL SESSION 10:00 AM

A. 2008 Budget/Special Assessment

XII. ADJOURN 10:30 AM

NOTICE OF MEETING

DATE: November 21, 2007

TO: San Marin Association

FROM: Joe Pauley, Optimum Property Management,
and Steve Woglom, Board President

SUBJECT: Special Meeting ~ Monday, November 26, 2007

Please be advised that a Special Meeting of the **San Marin Association Board of Directors only** will be held for the purpose of discussing issues affecting the annual mailing and associated disclosures at the following date, time and place:

DATE: Monday, November 26, 2007

TIME: **10:00 AM**

LOCATION: Telephone Conference

Any decisions affecting the association membership will be announced in the annual mailing.